

02-1278 B.N. v. Plastic Specialties Issued: 5/9/05

Plastic Specialties and its workers' compensation insurance carrier, Utah Guaranty Fund¹ (referred to jointly as "Plastic Specialties" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Lima's award of benefits to B. N. under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

Mr. N. filed an application for hearing on November 18, 2002, to compel Plastic Specialties to pay for medical treatment of his work-related injuries. Judge Hann held an evidentiary hearing on Mr. N.'s claim on October 14, 2003, and then issued an interim order referring the medical aspects of the claim to a medical panel.

Judge Hann subsequently resigned her position at the Commission and Judge Lima assumed responsibility over Mr. N.'s claim. In a decision dated December 28, 2004, Judge Lima adopted the medical panel's report and ordered Plastic Specialties to pay for Mr. N.'s medical treatment. Judge Lima also ordered Plastic Specialties to pay Mr. N.'s attorneys fees.

Plastic Specialties now requests Appeals Board review of this matter. Specifically, Plastic Specialties argues it was denied due process "by [Judge Hann's] decision to hold the administrative hearing without a medical records exhibit, relevant witnesses, and without affording to the parties the opportunity to present all the evidence relevant to [Mr. N.'s] claim." Second, Plastic Specialties contends Judge Lima erred in requiring Plastic Specialties to pay Mr. N.'s attorneys fees.

DISCUSSION

Although Plastic Specialties argues that Judge Hann's conduct of the evidentiary hearing on Mr. N.'s claim violated Plastic Specialties' right to due process, the hearing record establishes that Plastic Specialties failed to raise any objections at the time Judge Hann took the actions in question. It was Plastic Specialties' obligation to raise its objections to Judge Hann during the hearing. As the Utah Court of Appeals observed in *Broberg v. Hess*, 782 P.2d 198, 201 (Utah App. 1989):

A timely and recorded objection to the trial court's failure to comply with a request at trial puts the judge on notice of the asserted error and allows the opportunity for correction at that time in the course of the proceeding. . . . Since there is no record that an objection was lodged to the trial judge . . . appellant cannot for the first time after trial assert this error in a motion for new trial or on appeal. Because there was no timely objection, we make no determination of the issue on appeal.

The same considerations apply here. If Plastic Specialties had raised its objections during the evidentiary hearing, Judge Hann could have considered those objections and, if necessary,

adjusted hearing procedures accordingly. But instead of stating its objections and requesting a ruling, Plastic Specialties acquiesced to Judge Hann's procedural rulings. For that reason, the Appeals Board concludes that Plastic Specialties has waived its objections to those procedural rulings.

As a second argument, Plastic Specialties contends Judge Lima improperly ordered Plastic Specialties to pay Mr. N.'s attorneys fees. The Appeals Board agrees. The general rule in workers' compensation cases is that applicants' attorneys fees are deducted from the disability compensation that would otherwise be paid to the applicant. However, § 34A-1-309(4) of the Labor Commission Act creates a narrow exception to the general rule. Under §34A-1-309(4), the Commission may require an employer or insurance carrier to pay an applicants' attorneys fees in "medical only" cases, but **only** if "the commission's informal [mediation] mechanisms were fully used by the parties prior to the adjudication"

Judge Lima's decision makes no finding that the parties "fully used" the Commission's mediation process. Mr. N.'s response to Plastic Specialties' motion for review admits that the Commission's mediation process was not used. The Appeals Board therefore finds that the prerequisite of § 34A-1-309(4) has not been satisfied and that Plastic Specialties is not obligated to pay Mr. N.'s attorneys fees.

ORDER

The Appeals Board affirms Judge Lima's award of medical benefits to Mr. N.. The Appeals Board sets aside Judge Lima's award of attorneys fees against Plastic Specialties. It is so ordered.

Dated this 9th day of June, 2005.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

1. Utah Guaranty Fund has assumed the liability of Wasatch Crest Insurance in this matter.